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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO, Governor of Hawai'i,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address only the following question:

Whether the State of Hawai'i may implement Congress' delegation of its special or trust obligation to the Hawaiian people by establishing an Office of Hawaiian Affairs ("OHA") to administer trust funds dedicated to the betterment of the Hawaiian people and providing that OHA shall be governed by a Board of Trustees elected by the Hawaiian people without running afoul of the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE* [1]

At issue in this case is the constitutionality of a Hawai'i statute which provides that only "Hawaiians" may vote in elections for trustees of the Office of Hawaiian Affairs, whose primary responsibility is the administration of trust funds for the benefit of Hawaiians and "native Hawaiians." [2]

At the end of the 19th century, *amicus*, the Kamehameha Schools Bishop Estate Trust ("KSBE"), established the Kamehameha Schools on the island of O'ahu in Hawai'i. The Schools give preference in admission to children with at least one Hawaiian ancestor. KSBE is exempt from federal income taxation under the Internal Revenue Code, because it is an organization operated exclusively for educational purposes. See 26 U.S.C. § 501(c)(3). The Internal Revenue Service ("IRS") has determined that the Schools' preference for applicants with a Hawaiian ancestor does not constitute discrimination on the basis of race. See IRS, National Office Technical Advice Memorandum, *Kamehameha Schools/Bernice Pauahi Bishop Estate* (Apr. 19, 1999) ("IRS Memo."). The legal test for determining whether KSBE is entitled to section 501(c)(3) status

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* states that the parties consented to the filing of this brief in letters filed with this Court.

[2] "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2. "Native Hawaiian" means "any descendant of not less than one-half part of the . . . aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* In this brief, we refer to Hawaiians and Native Hawaiians collectively as "the Hawaiian people."

differs from the legal test for determining whether a law that makes distinctions based on ancestry is constitutional. See, *e.g.*, *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 592-96 (1983). Nonetheless, KSBE has a strong interest in demonstrating that the statute at issue does not unconstitutionally discriminate on the basis of race.

Amicus is uniquely qualified to address the history and legality of legislative preferences for the Hawaiian people. Born in 1831, Ke Ali'i Bernice Pauahi Bishop was the great-granddaughter of King Kamehameha I, and she inherited the private lands of the Kamehameha family. As an ali'i or chief, she was also a member of the traditional ruling class of the Hawaiian people. In the late 19th century, she, like other ali'i, saw that as a result of western discovery, her people "were in a terrible condition":

> In the year Pauahi was born there were 124,500 Hawaiians, and [in 1883], . . . there were approximately only 40,014 left. . . . Many of the remaining Hawaiians suffered from diseases such as leprosy, tuberculosis, diabetes, gonorrhea, syphilis, and cancer. Following the earlier epidemics, still more would fall to new sicknesses such as the mumps, beriberi, and diphtheria. [George H.S. Kanahele, *Pauahi: The Kamehameha Legacy* 170 (1986.)]

Hawaiian culture was suffering with its people, as the Hawaiian language gave way to English and as Hawaiian traditions were disparaged and neglected. *Id.* at 171. The Hawaiian people developed a crippling sense of defeat and of inferiority to western peoples. "There was an economic antecedent to most if not all of these problems. Hawaiians had long lost control of their economy, partly through the loss or sale of their lands and through being driven out of certain traditional occupational fields like farming[,] . . . small scale shipbuilding and retailing." *Id.* at 172.

Bernice Pauahi Bishop, again like other ali'i of her day, dedicated her family's resources to her people.[3] She concluded that education was essential to their survival and prosperity in the future. Accordingly, her Will, signed in 1883, bequeathed the majority of her estate:

> [T]o erect and maintain in the Hawaiian islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women. [Will of Bernice Pauahi Bishop, *reprinted in Wills and Deeds of Trust* 17-19.]

She further directed her trustees to "devote a portion of each year's income to the support and education of orphans, and others of indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood." *Id.* at 18.

The Kamehameha Schools for boys and girls were accordingly established in 1887 and 1894, respectively, and later consolidated as co-educational institutions. Their mission is to "Promote the educational development of

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[3] KSBE is only one of the Ali'i Trusts. In his 1874 Will, King William Lunalilo created a trust "for the use and accommodation of the poor, destitute and infirm people of Hawaiian blood and extraction, giving preference to old people." *See In re Will of William Charles Lunalilo*, Equity No. 2414-A (Haw. 1942). The Lunalilo Home cares for elderly Hawaiians today. The Queen Lili'uokalani Trust was established in 1909 "for the benefit of orphan and other destitute children in the Hawaiian islands, the preference to be given to Hawaiian children of pure or part aboriginal blood." Deed of Trust of Queen Lili'uokalani, dated Dec. 2, 1909, *recorded in the* Registry Office in Honolulu, Hawai'i, Liber 319, at 447-59. Today that trust funds the Queen Lili'uokalani Children's Center.

all people at KSBE; Encourage, cultivate and inspire students, graduates, and staff to serve the Hawaiian community and community at large; Preserve and perpetuate Hawaiian culture, traditions, and values; [and] Instill throughout the organization Hawaiian ancestral values."

As stated above, the Schools give preference in admission to applicants who have at least one Hawaiian ancestor. They are, however, exemplars of racial and cultural diversity. "*Applicants of any racial or ethnic background are admitted, as long as they have at least one Hawaiian ancestor.*" IRS Memo. at 2 (emphasis supplied). As the appendix to this brief vividly illustrates, the student population is remarkably diverse.

Amicus files this brief in support of the State to show that the statute at issue does not discriminate on the basis of race. It is instead a political preference for the aboriginal, formerly sovereign people of Hawai'i whose sovereignty was "illegally" overthrown and whose public lands were taken without "consent . . . or compensation." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993) ("Apology Resolution").

HISTORICAL BACKGROUND

1. Hawaiians are the indigenous or aboriginal people of the island group that is today the State of Hawai'i. Hawai'i was originally settled by voyagers from central and eastern Polynesia, traveling immense distances in double-hulled voyaging canoes and arriving in Hawai'i perhaps as early as 300 A.D. The original Hawaiians were thus part of the Polynesian family of peoples, which includes the Maori, Samoans, Tongans, Tahitians, Cook Islanders, Marquesans, and Easter Islanders. 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 3 (1938). Hundreds

of years of Hawaiian isolation followed the end of the era of "long voyages." *Id.* During these centuries, the Polynesians living in Hawai'i evolved a unique system of self-governance and a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Apology Resolution at 1510.

At the pinnacle of the political, economic and social structure of each of the major Hawaiian islands was a mo'i, a king. Below the king, individuals occupied three major classes. The highest class, the ali'i, were important chiefs. Next in rank were members of the kahuna class, who advised the ali'i as seers, historians, teachers, priests, astronomers, medical practitioners, and skilled workers. Third, the maka'ainana were the "people of the land," who fished and farmed and made up the bulk of the population. Lawrence H. Fuchs, *Hawaii Pono: An Ethnic and Political History* 5 (1961); *Native Hawaiian Rights Handbook* 5 (Melody K. MacKenzie ed., 1991).

The political, economic and social structures were mutually supportive. The kings held all land and property which they subdivided among the chiefs. Substantial chiefs supervised large estates (ahupua'as), which usually extended from the sea to the mountains so that they could fish, farm, and have access to the products of the mountain forest. They, in turn, divided the ahupua'as into 'ilis, run by lesser chiefs whose retainers cultivated the land. The commoners worked the land and fished, exchanging labor for protection and some produce from their own small plots. Agriculture was highly diverse, including taro, bananas, yams, sugar cane, and broadfruit. The taro plant, whose starchy root is pounded into poi, requires substantial moisture so Hawaiians developed a superior system of irrigation. See Jon J. Chinen, *The Great Mahele* 3-4 (1958); Fuchs, *supra* at 5-7; MacKenzie, *supra* at 3-5.

The Hawaiian economy was also dependent upon many skilled artisans. For example, special skills were necessary for the building of outrigger canoes, the making of tapa (a paper-like material used for clothing and bedding), the drying of fish, the construction of irrigation systems and fishponds, the catching of birds (whose feathers were worn in chiefs' cloaks and helmets), and the sharpening of stones for building and fighting. MacKenzie, *supra* at 4.

"The concept of private ownership of land had no place in early Hawaiian thought." *Id.* at 4. The moi's or king's authority was derived from the gods, and he was a trustee of the land and other natural resources of the island. *Id.* Chiefs owed military service, taxes, and obedience to the king, but neither chiefs, nor skilled laborers, nor commoners were tied to a particular piece of land or master. All lands conferred by the king or chief were given subject to revocation. In turn, neither commoners nor skilled laborers were required to stay with the land; if maltreated or dissatisfied, an individual could move to another ahupua'a or 'ili. *Id.*; see also Fuchs, *supra* at 5.

Hawaiians also had a complex religion, focused on several major gods—most notably Kane, god of life and light, Lono, god of the harvest and peace, Ku, god of war and government, and Pele, goddess of fire. The religion generated a detailed system of taboos (kapus), enforced by priests, which supported the political, economic and social systems of the islands. See Ralph S. Kuykendall & A. Grove Day, *Hawaii: A History* 11 (1964).

The language and culture of the Hawaiian people were rich and complex. Hawaiians possessed an "extensive literature accumulated in memory, added to from generation to generation, and handed down by word of mouth. It consisted of meles (songs) of various kinds, genealogies and honorific stories . . . [much of which] was used as an accompaniment to the hula." 1 Kuykendall, *supra* at

10-11. Hawaiians also had "a rich artistic life in which they created colorful feathered capes, substantial temples, carved images, formidable voyaging canoes, tools for fishing and hunting, surfboards, weapons of war, and dramatic and whimsical dances." Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 95 (1998) (citing, *e.g.*, Joseph Fehrer, *Hawai'i: A Pictorial History* 36-132 (1969)).

The communal nature of the economy and the caste structure of the society resulted in values strikingly different from those prevalent in more competitive western economies and societies. For example, Hawaiian culture stressed cooperation, acceptance, and generosity, and focused primarily on day-to-day living. See, *e.g.*, Fuchs, *supra* at 74-75.

Hawai'i was not Utopia. There were wars between the island chiefs and among other ali'i. Natural disasters, such as tidal waves and volcanic eruptions, often killed or displaced whole villages. But Hawai'i's social, economic, and political system was highly developed and evolving, and its population, conservatively estimated to be at least 300,000,[4] was relatively stable before the arrival of the first westerners.

2. Hawai'i was "discovered" by the west in 1778, when the first haole or white foreigner, English sea captain James Cook, landed. Because he arrived during a festival associated with Lono in a ship whose profile resembled Lono's symbol, he was greeted as that long-departed god. Other western ships soon followed on journeys of exploration or trade. E.S. & Elizabeth G. Handy, *Native Painters in Old Hawaii* 331 (1972).

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[4] This estimate is conservative; other sources place the number at one million. David E. Stannard, *Before the Horror: the Population of Hawai'i on the Eve of Western Contact* 59 (1989).

In the years that followed the arrival of Cook and other westerners, warring Hawaiian kings, now aided by haole weapons and advisers, fought for control of Hawai'i. King Kamehameha I won control of the Big Island, Hawai'i, and then successfully invaded Mau'i, Lana'i, Moloka'i, and O'ahu. By 1810, he also gained the allegiance of the King of Kaua'i. Despite the political unification of the islands, Kamehameha I's era saw the first steps toward the devastation of the Hawaiian people.

The immediate, brutal decimation of the population was the most obvious result of contact with the west. Between Cook's arrival and 1820, disease, famine, and war killed more than half of the Hawaiian population. By 1866, only 57,000 Hawaiians remained from the basically stable pre-1778 population of at least 300,000. See note 4, *supra*; see also *supra* at 2. The impact was greater than the numbers can convey: Old people were left without the young adults who supported them; children were left without parents or grandparents. The result was a rending of the social fabric.

This devastating population loss was accompanied by cultural, economic, and psychological destruction. Western sailors, merchants, and traders did not respect Hawaiian kapus or religion and were beyond the reach of the priests. The chiefs began to imitate the foreigners, whose ships and arms were so superior to their own. The kapus were abolished soon after Kamehameha I died. See Fuchs, *supra* at 8-9. Christianity, principally in the person of American missionaries, quickly flowed into the breach. Christianity condemned not only the native religion, but the worldview, language, and culture that were intertwined with it. The loss of the old gods, along with the law and culture predicated on their existence, resulted in

substantial social conflict and imbalance. *Id.* at 9; Kuykendall & Day, *supra* at 40-41.

Western merchants also forced rapid change in the islands' economy. Initially, Hawaiian chiefs sought to trade for western goods and weapons, taxing and working commoners nearly to death to obtain the supplies and valuable sandalwood needed for such trades and nonetheless becoming seriously indebted. As Hawai'i's stock of sandalwood declined, so, too, did that trade, but it was replaced by whaling and other mercantile activities. See Fuchs, *supra* at 10-11; Kuykendall & Day, *supra* at 41-43; MacKenzie, *supra* at 5. More than four-fifths of Hawai'i's foreign commerce was American; the whaling services industry and mercantile business in Honolulu were almost entirely in American hands. See Fuchs, *supra* at 18-19; MacKenzie, *supra* at 6, 9-10. What remained to the Hawaiian people was their communal ownership and cultivation of the land; but, as described *infra*, that, too, was soon replaced by a western system of individual property ownership.

3. As the middle of the 19th century approached, the islands' small haole population wielded an influence far in excess of its size. See Felix S. Cohen, *Handbook of Federal Indian Law* 799 (2d ed. 1982) ("[a] small number of Westerners residing in Hawaii, bolstered by Western warships which intervened at critical times, exerted enormous political influence"). These influential haoles sought to limit the absolute power of the Hawaiian king over their legal rights and to implement western property law so that they could accumulate and control land.

By dint of foreign pressure, these goals were achieved. See, *e.g.*, MacKenzie, *supra* at 6; 1 Kuykendall, *supra* at 206-26. In 1840, Kamehameha III promulgated a new constitution, establishing an hereditary House of Nobles and an elected House of Commons. And, in 1842, the

King authorized the Mahele of 1848; the beginning of the division of Hawai'i's communal land which led to the transfer of substantial amounts of land to western hands.

In the Mahele, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the main chiefs; he reserved about 1 million acres for himself and his successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawai'i ("Government Lands"). All land remained subject to the rights of native tenants. MacKenzie, *supra* at 7-9; Chinen, *supra* at 15-24. In 1850, after the division was accomplished, an act was passed permitting aliens to purchase land in fee simple. The expectation was that commoners would receive a substantial portion of the distribution to the chiefs because they were entitled to file claims to the lands that their ancestors had cultivated. In the end, however, only 28,600 acres (less than 1% of the land) were awarded to about 8,000 individual farmers.[5]

Soon after the Mahele, a dramatic concentration of land ownership in haole plantations, estates, and ranches occurred. Ultimately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs. MacKenzie, *supra* at 9-10.

These economic changes were devastating for the Hawaiian people. The communal land system of subsistence farming and fishing was at an end. Large land estates owned by haoles controlled virtually all arable land. Hawaiians were not considered sufficiently cheap, servile labor for the backbreaking plantation work, and, indeed, did not seek it. Unable successfully to adjust either to the

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[5] *See* MacKenzie, *supra* at 7. Many maka'ainana did not secure their land because they did not know of or understand the law, could not afford the survey costs, feared that a claim would be perceived as a betrayal of the chief, were unable to farm without the traditional common cultivation and irrigation of large areas, were killed in epidemics, or migrated to cities. *Id.* at 8.

new economic life of the plantation or to the competitive economy of the city, many Hawaiians became part of " 'the floating population crowding into the congested tenement districts of the larger towns and cities of the Territory' under conditions which many believed would 'inevitably result in the extermination of the race.' " *Id.* at 44 (quoting S. Con. Res. 2, 10th Leg. of the Territory of Hawai'i, 1919 Senate Journal 25-26). Hawaiians developed a debilitating sense of inferiority, and descended to the bottom tier of the economy and the society of Hawai'i.

4. The mutual interests of Americans living in Hawai'i and the United States became increasingly clear as the 19th century progressed. American merchants and planters in Hawai'i wanted access to mainland markets and protection from European and Asian domination. The United States developed a military and economic interest in placing Hawai'i within its sphere of influence. In 1826, the United States and Hawai'i entered into the first of the four treaties the two nations signed during the 19th century. Americans remained concerned, however, about the growing influence of the English (who briefly purported to annex Hawai'i in 1842) and the French (who forced an unfavorable treaty on Hawai'i in 1839 and landed troops in 1849). American advisors urged the King to pursue international recognition of Hawaiian independence, backed up by an American guarantee.

In pronouncements made during the 1840s, the administration of President John Tyler announced the Tyler Doctrine, an extension of the Monroe Doctrine. It asserted that the United States had a paramount interest in Hawai'i and would not permit any other nation to have undue control or exclusive commercial rights there. Secretary of State Daniel Webster explained:

> The United States . . . are more interested in the fate of the islands, and of their government, than any

> other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the . . . Islands ought to be respected; that no power ought either to take possession of the islands as conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government, or any exclusive privileges or preferences in matters of commerce. [S. Exec. Doc. No. 52-77, 40-41 (1893) (describing 1842 statement).]

America's already ascendant political influence in Hawai'i was heightened by the prolonged sugar boom which followed the Mahele. Sugar planters were eager to eliminate the United States' tariff on their exports to California and Oregon. The mainland sugar growers strongly resisted the lifting of the tariff, but the United States' fear of "incipient foreign domination of the Islands" near its coast was stro than the mainland growers' lobby. Fuchs, *supra* at 2. The 1875 Convention on Commercial Reciprocity, Jan. 30, 1875, U.S.-Haw., 19 Stat. 625 (1875) ("Reciprocity Treaty"), eliminated the American tariff on sugar from Hawai'i and virtually all tariffs that Hawai'i had placed on American products. Critically, it also prohibited Hawai'i from giving political, economic, or territorial preferences to any other foreign power. Finally, when the Reciprocity Treaty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.

5. Americans were determined to ensure that the Hawaiian government did nothing to damage Hawai'i's growing political and economic relationship with America. But the Hawaiian King and people were bitter about the loss of their lands to foreigners and were hostile both to the tightening bond with the United States and the increasing importation of Oriental labor by haole plantations.

Matters came to a head in 1887, when King Kalakaua appointed an anti-haole prime minister. The prime minister, with the strong support of the Hawaiian people, opposed granting a base at Pearl Harbor as a condition for extension of the Reciprocity Treaty, and took other measures that were considered anti-western. The business community, backed by the all-haole military group, the Honolulu Rifles, forced the prime minister's resignation and the enactment of a new constitution. The new constitution—often referred to as the Bayonet Constitution, Kuykendall & Day, *supra* at 171; MacKenzie, *supra* at 11—reduced the king to a figure of minor importance. It extended the right to vote to western males whether or not they were citizens of the Hawaiian Kingdom, and disenfranchised almost all native voters by giving only residents with a specified income level or amount of property the right to vote for members of the House of Nobles. The representatives of propertied haoles took control of the legislature. See MacKenzie, *supra* at 11 & n.71. A suspected native revolt in favor of the King's younger sister, Princess Lili'uokalani, and a new constitution were quelled when the American minister summoned Marines from an American warship at Honolulu. Haoles remained firmly in control of the government until the death of the King in 1891, when Queen Lili'uokalani came to power. See Fuchs, *supra* at 30.

On January 14, 1893, the Queen was prepared to promulgate a new constitution, restoring the sovereign's control over the House of Nobles and limiting the franchise to Hawaiian subjects. See MacKenzie, *supra* at 11; 3 Kuykendall, *supra* at 585-86. She was, however, forced to withdraw her proposed constitution. See Fuchs, *supra* at 30.

Despite the Queen's apparent acquiescence, the majority of haoles recognized that the Hawaiian monarchy posed

a continuing threat to the unimpeded pursuit of their interests. They formed a Committee of Public Safety to overthrow the Kingdom. Mercentile and sugar interests also favored annexation by the United States to ensure access on favorable terms to mainland markets and protection from Oriental conquest.

A Honolulu publisher and member of the Committee, Lorrin Thurston, informed the United States of a plan to dethrone the Queen. In response, the Secretary of the Navy informed Thurston that President Harrison had authorized him to say that " 'if conditions in Hawaii compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here.' " L.A. Thurston, *Memoirs of the Hawaiian Revolution* 230-32 (1936). The American annexation group closely collaborated with the American Minister in Hawai'i, John Stevens.

On January 16, 1893, at the order of Minister Stevens, American soldiers marched through Honolulu, to a building known as Arion Hall, located near both the government building and the palace. MacKenzie, *supra* at 3. The next day, local revolutionaries seized the government building and demanded that Queen Lili'uokalani abdicate. Stevens immediately recognized the rebels' provisional government and placed it under the United States' protection. *Id.*; see also Kuykendall & Day, *supra* at 178.

President Harrison promptly sent an annexation treaty to the Senate for ratification and denied any United States' involvement in the revolution. Before the Senate could act, however, President Cleveland, who had assumed office in March of 1893, withdrew the treaty. An investigator reported that the revolution had been accomplished by force with American assistance and against the wishes of Hawaiians. See Kuykendall & Day, *supra* at 179. To Congress, President Cleveland declared:

> [I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation. [3 Kuykendall, *supra* at 364.]

He demanded the restoration of the Queen. But the Senate Foreign Relations Committee issued a report ratifying Stevens' actions and recognizing the provisional government, explaining that relations between the United States and Hawai'i are unique because "*Hawaii has been all the time under a virtual suzerainty of the United States.*" S. Rep. No. 53-277, at 21 (1894) (emphasis supplied).

As a result of this impasse, the United States government neither restored the Queen nor annexed Hawai'i. The provisional government thus called a constitutional convention whose composition and members it controlled. See Kuykendall & Day, *supra* at 183. The convention promulgated a constitution that imposed property and income qualifications as prerequisites for the franchise and for the holding of elected office. *Id.* at 184; MacKenzie, *supra* at 13. " 'Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that this constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic.' " W. A. Russ, *The Hawaiian Republic (1894-1898)* 33-34 (1961). The Republic also claimed title to the Government Lands and Crown Lands, without paying compensation to the monarch. See MacKenzie, *supra* at 13. In 1894, Sanford Dole was elected President of the Republic of Hawai'i, and the United States gave his government prompt recognition.[6]

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[6] A short-lived counter-revolution commenced on January 7, 1895. Republic police discovered it, arrested many royalist leaders, and

The election of President McKinley in 1896 gave the annexation movement new vigor. Another annexation treaty was sent to the Senate. Simultaneously, the Hawaiian people adopted resolutions sent to Congress stating that they opposed annexation and wanted to be an independent kingdom. Russ, *supra* at 198, 209.[7] The annexation treaty failed in the Senate. But, to avoid the constitutional treaty procedure, pro-annexation forces in the House of Representatives introduced a Joint Resolution of Annexation which needed only a majority in each House of Congress. The balance was tipped at this moment by the United States' entry into the Spanish-American War. American troops were fighting in the Pacific, particularly in the Philippines, and the United States needed to be sure of a Pacific base. See Kuykendall & Day, *supra* at 188; MacKenzie, *supra* at 14. In July 1898, the Joint Resolution was enacted—"the fruit of approximately seventy-five years of expanding American influence in Hawaii." Fuchs, *supra* at 36.

On August 12, 1898, the Republic of Hawaii ceded sovereignty and conveyed title to its public lands, including the Government and Crown Lands, to the United States. Joint Resolution for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898) ("Annexation Resolution"). In 1900, Congress passed the Organic Act, Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) ("Organic Act"), establishing Hawai'i's territorial government. And, in 1959, Congress admitted

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imprisoned the Queen. Eventually, she was forced to swear allegiance to the new Republic in exchange for clemency for the revolutionaries. MacKenzie, *supra* at 13; Fuchs, *supra* at 34-35.

[7] The resolutions were signed by 21,269 people, representing more than 50% of the Native Hawaiian population in Hawai'i at that time. *See* Van Dyke, *supra* at 103 & n.48 (citing Dan Nakaso, *Anti-Annexation Petition Rings Clear*, Honolulu Advertiser, Aug. 5, 1998, at 1).

Hawai'i to the Union as the 50th state. Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("Admission Act").

6. Commencing with the Joint Resolution for Annexation, the United States has repeatedly recognized that, as a result of the above-recited history, it has a special relationship with the Hawaiian people and a trust obligation with respect to the public lands of Hawai'i.[8]

The special or trust relationship between the Hawaiian people and the United States was most explicitly affirmed in the Hawaiian Homes Commission Act of 1920 ("HHCA"), Pub. L. No. 76-34, 42 Stat. 108 (1921). Alarmed by the continuing impact of westernization and the loss of a communal land base, the Hawaiian people's leaders sought rehabilitation through a return to the land. See Fuchs, *supra* at 71; MacKenzie, *supra* at 17. Congress responded with HHCA, which set aside almost 200,000 acres of Hawai'i's public lands for long-term leases at nominal rent to native Hawaiians. For a variety of reasons, most notably the deliberate exclusion of the best agricultural land from homesteading, the Act did not succeed in its purpose. Its enactment has substantial importance, however, because it constitutes an express affirmation of the United States' trust responsibility to the Hawaiian people. See Van Dyke, *supra* at 104.

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[8] The Joint Resolution stated that "[t]he existing land laws of the United States relative to public lands shall not apply to such [public] land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition" and that revenues from the lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Annexation Resolution at 750. Section 73 of the Organic Act of 1900 returned control of most of the lands to the territory, but it, too, required that revenues be devoted to "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation." Organic Act at 155 (§ 73).

In hearings preceding HHCA's enactment, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised:

> One thing that impressed me . . . was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty. [H.R. Rep. No. 66-839, at 4 (1920).]

He explicitly analogized the relationship between the United States and native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that special programs for native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[9]

In the Admission Act of 1959, Congress required Hawai'i's new state government to take responsibility for the Hawaiian Home Lands as a condition of statehood. In addition, Congress entrusted to the State 1,200,000 acres of Hawai'i's former public lands to be held for five listed purposes, including "the betterment of the conditions of the native Hawaiians." Admission Act at 6 (§ 5(f)). As Congress recently explained, the United States, in the Admission Act, "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f)." Native Hawaiian Health Care Improvement Act Amendments of 1992, 42 U.S.C. § 11701(16).

Moreover, since the 1970s, Congress has passed myriad statutes providing special programs for the Hawaiian people or including the Hawaiian people in general programs

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9 *See* H.R. Rep. No. 66-839, at 129-30 (statement of Secretary Lane) ("[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world").

for native people. The full list of such federal laws is attached to the *amicus* brief of the Congressional Delegation of the State of Hawai'i. These laws recognize the United States' special relationship with the Hawaiian people.

Most pertinently, in the 1993 Apology Resolution, the United States recognized the historical record which is, in part, the source of its special or trust relationship with the Hawaiian people. 107 Stat. at 1510. The Apology Resolution finds that the Hawaiian people are "indigenous" to Hawai'i; that the Republic of Hawai'i "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii without the consent of or compensation to the native Hawaiian people of Hawaii or their sovereign government"; and that the "Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." *Id.* at 1512.[10]

The Hawaiian people received no independent benefits from the public lands trust until the state constitution was amended at a 1978 Constitutional Convention. The constitutional amendments affirmed that the State holds the ceded public lands as a trust, with Native Hawaiians as a distinct beneficiary. The amendments also created an Office of Hawaiian Affairs ("OHA") to administer a pro rata share (currently 20%) of the public land trust established under the Admission Act for the "betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3(1). OHA is governed by a Board of Trustees whose

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10 *See also* 1994 Native Hawaiian Education Act, 20 U.S.C. § 7902(1), (5), (8) (finding that the Hawaiian people are "a distinct and unique indigenous people"; that the Kingdom of Hawaii was overthrown with United States' assistance, depriving Hawaiians of the right to self-determination; and affirming "the special relationship between the United States and the Native Hawaiians").

primary responsibility is to administer assets to benefit the Hawaiian people. *Id.* § 10-3(2). The OHA Trustees are elected for staggered four-year terms by a majority of qualified Hawaiian voters. *Id.* § 13D-3(b). Congress has ratified this exercise of Hawai'i's delegated federal authority by enacting laws that direct money and assign responsibilities to OHA. See, *e.g.*, 16 U.S.C. § 470w(18); 42 U.S.C. § 2991b-1.

SUMMARY OF ARGUMENT

The history of the Hawaiian people and of their relationship with the United States during the 19th century is outlined in the Background section. That history decisively demonstrates that Hawaiians are the Native Americans of Hawai'i. The legal analysis applicable to legislation mandating special treatment for Native Americans, including Hawaiians, is well established and deeply rooted in the Constitution. Application of that analysis to the law at issue—providing for the election of OHA trustees by Hawaiians—demonstrates that it is a manifestly appropriate exercise of Congress' broad authority to regulate relations with Native American groups and does not conflict with the Fourteenth Amendment.

The Founders understood that, as the United States extended its dominion, it would develop continuing relationships with the once-sovereign native peoples occupying its new territory, and the Constitution thus conferred upon Congress virtually plenary authority over relations with such peoples. In exercising that authority, Congress has often acknowledged that it has a special trust relationship with groups of indigenous people of the United States, resulting in part from the fact that the United States "took possession of [Indian] lands, sometimes by force, leaving them . . . needing protection." *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). As a result, this Court has

routinely recognized that legislation "with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States* v. *Antelope*, 430 U.S. 641, 645 (1977). Instead, it is premised on native peoples' "unique legal" and "political" status, and within Congress' substantial discretionary power so long as it is "tied rationally" to the special or trust relationship. *Morton* v. *Mancari*, 417 U.S. 535, 547-55 (1974).

History reveals that Hawaiians were the aboriginal people of the State which is today Hawai'i, and that they were a culturally and geographically-unified people who governed themselves. It further demonstrates that the United States played a principal role in the Hawaiian people's loss of their sovereignty, land, and culture, and thereafter assumed and repeatedly acknowledged its special or trust relationship with the Hawaiian people. Finally, the historical narrative shows that Congress delegated to the State of Hawai'i, as a condition of its admission to the Union, authority to act in futherance of the federal trust obligation, and that the law at issue was enacted pursuant to that delegation.

In these circumstances, the law is premised on a political, rather than a racial, classification and is plainly constitutional. The political nature of the classification is highlighted by the fact that it neither fully encompasses nor fully excludes any race. Hawaiians are Polynesians, yet Polynesians who are not Hawaiian may not vote in the elections for OHA trustees; and the class termed Hawaiians is comprised of individuals of numerous racial backgrounds. This classification is primarily political in origin and purpose: It is intended to describe the aboriginal people of Hawai'i who were deprived of their sovereignty and their land by the United States.

ARGUMENT

LEGISLATION SPECIFIC TO THE HAWAIIAN PEOPLE FULFILLS THE UNITED STATES' SPECIAL OR TRUST OBLIGATION AND IN NO WAY OFFENDS THE CONSTITUTION.

Legislation specific to the aboriginal peoples of the United States is constitutional if it meets three requirements established by this Court's decisions. First, the group at issue must be a culturally and geographically-unified, indigenous people who governed themselves and inhabited land now within the United States. Second, the United States, by virtue of its historic conduct and present actions, must have established a special relationship with, or assumed a trust obligation toward, the group. Third, the legislation at issue must be "tied rationally" to fulfillment of the purposes of the special relationship or trust obligation, such as furtherance of the group's self-governance or self-sufficiency or preservation of the group's unique culture. See, *e.g.*, *Mancari*, 417 U.S. at 545-55; *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 83-85 (1977); *United States* v. *John*, 437 U.S. 634, 647-50 (1978). Legislation that satisfies these requirements employs "political" rather than "racial" classifications, *Mancari*, 417 U.S. at 553 n.24, and thus does not offend the Equal Protection Clause of the Fourteenth Amendment of the Constitution.[11] The legislation at issue in this case fulfills this Court's requirements.

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[11] Since *Mancari*, this Court has never overturned a statute or treaty upholding preferential or separate programs for, or treatment of, native peoples. *See Antoine* v. *Washington*, 420 U.S. 194, 207-08 (1975); *Fisher* v. *District Court*, 424 U.S. 382, 390-91 (1976); *Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-83 (1976); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 90 (1977); *United States* v. *Antelope*, 430 U.S. 641, 648-50 (1977); *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502 (1979); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 678-79 (1979); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 253-54 (1985).

A. The Hawaiian People Are The Natives Of Hawai'i.

The Hawaiian people are the aboriginal people of Hawai'i. They are "Indians" within the meaning of the United States Constitution, because they are the native people of an area which is now part of the United States. See, *e.g.*, *Pence* v. *Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) ("the word 'Indian' is commonly used in this country to be 'the aborigines of America' "); Cohen, *supra* at 797-810 (same).[12] Congress has acknowledged that the Hawaiian people are "indigenous" people and that they "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Apology Resolution at 1510. The Hawaiian people were fully self-governing prior to contact with the west in 1778, and the Kingdom of Hawai'i was sovereign, albeit subject to increasing American domination, until 1893. The historical record thus clearly shows that the Hawaiian people constitute a native group toward which the United States may assume a special or trust obligation. See *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) ("long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state").

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[12] *Accord Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 87 (1918) (treating Alaskan natives as "Indians"). For a detailed demonstration that the Hawaiian people are Indians, *see* Brief of *Amici* Cook Inlet Region & Alaska Federation of Natives.

B. The United States Has Established A Special Or Trust Relationship With The Hawaiian People.

1. Equally clearly, the United States has in fact established a special or trust relationship with the Hawaiian people. This relationship is characteristic of relations between the United States and other previously sovereign Native American groups. After western contact, "[n]ative population fell drastically as traditional systems collapsed." Cohen, *supra* at 799. In addition, the United States "'overcame the [Hawaiian people] and took possession of their lands, sometimes by force, leaving them . . . needing protection.'" *Mancari*, 417 U.S. at 552.

Americans certainly played a substantial role in importing diseases that decimated the Hawaiian population, in the erosion of the native religion and the language and culture intertwined with it, and in the destruction of Hawai'i's system of communal land ownership. These actions laid the groundwork for the United States' increasing political sovereignty and economic domination in the islands, culminating in the United States' decisive participation in the illegal overthrow of Hawai'i's constitutional monarchy, its annexation of Hawai'i, and its possession of 1,800,000 acres of public land in Hawai'i "without the consent of or compensation to" the Hawaiian people. Apology Resolution at 1512.

History thus provides a firm basis for a special or trust relationship between the United States and the Hawaiian people, and the United States has on numerous occasions acknowledged that such a relationship exists. See *supra* at 17-20.

2. In response, petitioner asserts that, as a matter of law, the United States may not establish a special or trust relationship with the Hawaiian people. His claim is that the United States may establish such relationships only with Indian *tribes*; that the Hawaiian people are not a tribe within the meaning of the Constitution; and therefore that neither the United States nor its delegatee may enact legislation specific to them. The premise of this argument is wrong and so, hence, is its conclusion.

In cases implicating the United States' special or trust relationship with Indians, this Court has expressly held that Congress' authority to enter into such relationships extends beyond federally-recognized Indian tribes. In both *Weeks*, 430 U.S. at 84, and *John*, 437 U.S. at 651-54, this Court rejected Equal Protection challenges to preferences for Indians who were not formally members of any tribe. In *Weeks*, the Court upheld a federal statute distributing assets to the heirs of members of two tribes, without regard to whether the heirs were themselves tribal members, because the legislation "'fulfill[ed] . . . Congress' unique obligation toward the Indians.'" 430 U.S. at 85 (quoting *Mancari*, 417 U.S. at 55). And in *John*, the Court held that Congress could create a separate criminal jurisdiction applicable to nontribal Indians in Mississippi. Observing that these Indians were only a "remnant of a larger group of Indians" which had moved to Oklahoma and "cannot now be regarded as a tribe," the Court nonetheless authorized special treatment of the group based, in part, on the possibility that it might again become a separate legal entity. Id. at 650 n.20, 653 (internal quotation marks omitted).

These cases make plain that the *Mancari* rule is not limited to legislation affecting federally-recognized Indian tribes. Instead, it applies whenever Congress assumes a special or trust obligation toward a native people which can be historically justified. The Hawaiian people are the descendants of a sovereign, geographically and culturally-unified group toward which the United States has assumed a special or trust relationship.[13] Moreover, they are, with

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[13] Because the Hawaiian people were self-governing and geographically and culturally-unified prior to western contact, Congress

the support and assistance of the United States government and the State of Hawai'i, in the process of regaining some measure of self-government, tribal land, and self-sufficiency. See also Hon. Samuel P. King, *Hawaiian Sovereignty*, Haw. B. J. 6 (July 1999). In these circumstances, legislation that is specific to the Hawaiian people and rationally related to fulfillment of the special or trust obligation, see *infra*, is clearly constitutional.

Petitioner's argument, in essence, is that the United States may enter into a special or trust relationship only with groups of native peoples who have continuously retained some modicum of federally-recognized sovereignty. Put differently, the argument is that the Constitution gives Congress *less* constitutional authority to recognize its obligations toward a native people whose sovereignty it destroyed and whose lands it has taken without compensation, than toward a native people with whom it has left some remnant of its power and its land. This argument finds no support in decisions of this Court, in the Constitution, or in justice, and should be rejected.[14]

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has the authority to treat them as descendants of a "tribe" (or as in the process of re-establishing a "tribe") within the meaning of the Constitution. *See* U.S. Const. art. I, § 8, cl. 3 (conferring upon Congress the power to regulate commerce "with the Indian tribes"). "The term tribe has no universal legal definition. There is no single federal statute defining an Indian tribe for all purposes." Cohen, *supra* at 3. Congress unquestionably has broad power to decide whether a group was, is, or may again be, a tribe for purposes of exercising its power under the Indian Commerce Clause. *See Sandoval*, 431 U.S. at 46-47.

[14] Petitioner seems to argue that the United States could not establish a special or trust relationship with the Hawaiian people, because the latter have had the right to vote since Hawai'i became a territory of the United States. Br. at 42-43. This argument is plainly wrong. All Native Americans have had the right to vote since 1924, *see* Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 254 (1924); and the United States nonetheless continues to have a trust obligation toward them. *See, e.g., John*, 437 U.S. at 652-53.

C. The Legislation At Issue Is Tied Rationally To Fulfillment Of The Special Or Trust Obligation.

The final requisite for the constitutionality of legislation which is specific to Hawaiian people is that "the special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation." *Mancari*, 417 U.S. at 555. Petitioner contends that the legislation limiting voter eligibility to Hawaians in elections for OHA trustees does not satisfy this standard. He asserts that the provision is *state* legislation that lacks federal authorization. In addition, he maintains that, even assuming the law is within the State's delegated authority, it does not fulfill the purposes of the special or trust relationship. Both assertions are wrong.

First, this Court has clearly held that state laws enacted under the authority of federal legislation are to be treated as expressions of the federal trust responsibility and should be judged by the standards used in evaluating federal law. See *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 499-502 (1979). In the Admission Act of 1959, Congress expressly delegated to the State part of its authority to further the special or trust relationship with the Hawaiian people. Most relevant here, it ceded public lands back to the State in trust to be used for five purposes, including the "betterment of the conditions of native Hawaiians." Admission Act at 6 (§ 5(f)).

To carry out its delegated responsibility with respect to the public land trust, Hawai'i amended its Constitution to establish OHA, whose primary responsibility is administration of a pro rata share of the revenues generated by the public land trust for the *federally-authorized purpose* of "better[ing] the conditions of native Hawaiians." The state law provision at issue was thus enacted pursuant to an express federal delegation of responsibility for admin-

istration of the public land trust and Hawai'i's decision to establish OHA has been ratified by Congress on numerous occasions. See *supra* at 20. It must therefore be judged by the standards applicable to federal laws intended to fulfill a special or trust obligation.

Second, the State's specification of a Hawaiian electorate to elect the trustees who will administer trust funds for the benefit of the Hawaiian people furthers Congress' special relationship with the Hawaiian people. It fosters "self-government" and makes the trustees "more responsive to the interests of the people [the trust and the OHA] w[ere] created to serve." *Mancari*, 417 U.S. at 543, 554. Petitioner's assertion that a trustee elected by an electorate would have a fiduciary duty with respect to his or her trust obligation is correct, but beside the point. The critical question is whether the legislative decision to foster self-determination in this way is reasonably deemed to fulfill the delegated federal obligation to the Hawaiian people. Plainly, it is.

D. Legislation Specific To The Hawaiian People Is Premised On A "Political," Not A Racial, Classification.

As demonstrated above, the legislation at issue is premised on a political classification and thus does not violate the Equal Protection Clause. The political nature of the classification here is further illuminated by the fact that it neither fully encompasses nor fully excludes any racial group. For example, the Hawaiian people are members of the Polynesian family of peoples, which includes people of many national origins. See *supra* at 4-5. Preferences for the Hawaiian people, however, do not extend to other Polynesians. See *Mancari*, 417 U.S. at 553 n.24 (the classification "operates to exclude many individuals who are racially classified as 'Indians' "). Equally to the point, although a Hawaiian has at least one Hawaiian ancestor and a unique heritage and history, a Hawaiian may be a

member of any of a number of "races." For example, *amicus* Kamehameha Schools give preference in admission to applicants with at least one Hawaiian ancestor, but the Schools are attended by students of many "races."

To be sure, the classification, like the classification at issue in *Mancari* and its progeny, has a component that is related to race—the requirement of descent from the sovereign people who occupied the Hawaiian islands prior to 1778, all of whom were members of a branch of the Polynesian family. But that component is designed not to designate a race, but rather to describe the aboriginal people deprived of sovereignty and land by the United States. The point is not that special treatment of indigenous people lacks any racial aspect, but rather that it is primarly political in origin and object and that, with respect to the Hawaiian people, the classification does not correspond in a coherent or practical way with the preference or exclusion of a particular "race."

Petitioner, however, contends that the intent of Congress and the State of Hawai'i to discriminate on the basis of race is revealed by the decision to define the Hawaiian people as descendants of those who lived in the islands in 1778 when the first westerner, Captain Cook, arrived, rather than in 1893, when the Kingdom was overthrown. The delineation of the aboriginal group with which the United States has established a special or trust relationship is, of course, for Congress, so long as its definition is not arbitrary. Cf., *e.g.*, *Sandoval*, 231 U.S. at 46. Congress' selection of 1778—the date of Hawai'i's first western contact—was entirely reasonable, in light of the historical experience of the Hawaiian people from that date through 1893.

The story of 19th century Hawai'i is the story of the Hawaiian people's losses—the loss of population, the end of their communal economic system, the crumbling of

their religion and culture, and the erosion of their political sovereignty. These losses were in substantial measure the result of the United States government's growing political and economic dominance in Hawai'i. Petitioner's account of 19th century Hawai'i is thus entirely ahistorical and misleading. Congress clearly had the power to select the date of western contact as the moment at which the Hawaiian people were a fully self-governing people in control of their economy, land, and culture, and to assume a special or trust obligation toward the descendants of that indigenous people.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A